31730 SERVICE DATE - JUNE 29, 2001
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34020

FLETCHER GRANITE COMPANY, LLC - PETITION FOR DECLARATORY ORDER

Decided: June 25, 2001

In a petition filed March 13, 2001, Fletcher Granite Company, LLC, successor in interest to H.E. Fletcher Company (Fletcher), seeks a declaratory order that the Board has exclusive jurisdiction over the resumption of rail service by Fletcher over certain sidetrack in Westford, MA. Fletcher owns and operates a granite quarry and stone fabrication mill in Westford and the sidetrack runs from its quarry and fabrication mill to the mainline connection of the Stoney Brook Branch of the Boston & Maine Corporation (B&M).[1] The Town of Westford filed a notice of appearance on March 26, 2001.

Fletcher indicates that rail operations connecting the granite quarry (located on the north side of Groton Road) and mill (on the south side of Groton Road) with the Stoney Brook Branch began in 1895. Fletcher laid the rail track on its property and provided its own rail service to the B&M interchange. This service continued until about 1965, when Fletcher decided to ship granite by truck instead of rail. While Fletcher has discontinued rail service from the fabrication mill to the B&M, it has maintained rail service on the part of its track running from the quarry to the fabrication mill. With the exception of the switch to the B&M that was removed in 1965, the original track remains in place. Debris, however, has been dumped on the right-of-way by local land abutters, and residents have placed retaining walls and a landfill parallel to the track but within the right-of-way. Fletcher contends that neither it nor any other entity has attempted to abandon the track, and that it was not aware of the encroachments to its property until it began repair work in preparation for the reuse of the line.

Fletcher submits that it has had extensive discussions with B&M concerning reestablishing rail service and that the parties have agreed as to what would be needed to repair or upgrade the track. B&M has also agreed to replace the switch to the Stoney Brook line and to furnish rail service to and from the interchange.

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[1] Fletcher states that rail operations are conducted by the Springfield Terminal Railway Company, which, like B&M, is part of the Guilford Rail System.

Fletcher states that it has repaired the grade crossing at Groton Road and plans to improve another grade crossing at Brookside Road.[2] It has retained a railroad design and construction consultant to determine what is needed to resume safe rail service. Fletcher asserts that the consultant believes "the required improvements are viable." Petition at 3 (citation omitted).

Fletcher is concerned that the resumption of rail service could be delayed or defeated if state and local officials try to regulate the matter. Fletcher claims that its concerns are not speculative, citing negative press coverage and alleged hostility by the local community to development in Westford. It also asserts that part of its right-of-way abuts a brook and wetlands, and that it has been told by local officials that resuming service would entail an environmental permitting process under state law and review by the local Conservation Commission. Fletcher states that it will submit its workplan to the Conservation Commission and will work consistently with applicable environmental standards by, for example, not storing materials in protected wetlands. Nevertheless, Fletcher asserts that, if its proposal comes under Conservation Commission review, it will likely "become involved in extensive, time-consuming hearings that will result in either denial of any permit application or the imposition of such expensive and unwieldy conditions that the project will be unfeasible to complete." Petition at 4 (citation omitted). In any event, Fletcher claims that the permitting process will substantially delay and add cost to the project.

Accordingly, Fletcher seeks a declaratory order that, under 49 U.S.C. 10501(b)(2), the Board has exclusive jurisdiction over the resumption of rail service and that local or state regulation is preempted. Fletcher argues that, while the Board does not have licensing and conditioning authority over ancillary facilities, citing 49 U.S.C. 10906, Congress gave the Board exclusive jurisdiction over rail transportation under section 10501(b).

DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, "the agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. 554(e). See also 49 U.S.C. 721. It would be premature for the Board to institute a declaratory order proceeding at this point, as there is not now, and may never be, a controversy that needs to be terminated. Westford, while filing a notice of appearance, has not submitted any substantive views on this matter. Nor does Westford appear to have taken any official action that would impede the resumption of rail service over Fletcher's track. Fletcher, moreover, has indicated that it will submit workplans and act consistently with applicable environmental standards. Thus, the Board will not attempt to intervene in this matter at this time.

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[2] Fletcher states that the Federal Highway Administration (FHWA), pursuant to its Federal Railroad Grade Crossing Program, has funded 80% of the cost of the Groton Road grade crossing improvements. It has also approved funding for the Brookside Road grade crossing improvements, and funds will be released when work begins.

Nevertheless, to provide guidance to the parties, this decision will summarize relevant court and agency case law addressing similar situations. Under 49 U.S.C. 10501(b)(2), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), the Board has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located, or intended to be located entirely in one State." Section 10501(b)(2) further provides that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn); Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale I) at 5. As several courts have held, this statutory preemption applies even in cases involving the construction of ancillary tracks and facilities under section 10906, even though the Board does not have licensing authority over such matters and therefore does not conduct its own environmental review.[3] See Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000) (Flynn)[4] and cases cited in Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) (Ayer) at 8, Riverdale I at 5-9, and Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Feb. 27, 2001) (Riverdale II) at 3.

In addressing the scope of 49 U.S.C. 10501(b), the courts have found that, under this broad preemption provision enacted in ICCTA, zoning ordinances and local land use permit requirements are preempted as to facilities that are an integral part of a railroad's interstate operations. Norfolk Southern Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997); Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000) (Ridgefield Park). Moreover, state and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations.

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[3] Under 49 U.S.C. 10906, "The Board does not have authority . . . over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."

[4] The Flynn court noted that while the Board does not have regulatory authority over section 10906 projects, it does have jurisdiction over these rail activities. Id. at 1189-90.

Auburn and Kent, WA– Petition for Declaratory Order – Burlington N.R.R. – Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff'd, City of Auburn.[5]

The Board has regulatory authority over rail line constructions under 49 U.S.C. 10901, and it conducts an environmental review of such activities under the National Environmental Policy Act (NEPA), and can adopt appropriate environmental mitigation conditions in response to concerns of the parties, including local authorities. See Ayer at 4, n.14.[6] However, there is no statutory requirement for a carrier to obtain Board approval to build or expand facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets. See Nicholson v. ICC, 711 F.2d 364, 368-70 (1983), cert. denied, 464 U.S. 1056 (1984); Riverdale I. Railroads also do not require Board authority to upgrade an existing line, and, as noted, the law explicitly provides that a license is not required to construct "spur," "industrial," or "switching" tracks, see 49 U.S.C. 10906. Where no license is required, there is no environmental review conducted by the Board. Regardless of whether a project falls under section 10901 or 10906, however, the preemption provisions of section 10501(b) apply.

It should be noted, moreover, that in Stampede Pass, Riverdale I, and Ayer, the Board expressed its view that not all state and local regulations that affect railroads are preempted.[7]

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[5] The argument that the statutory preemption in section 10501(b) is limited to state and local "economic" regulations was rejected by the court as contrary to the statutory text and unworkable in practice. City of Auburn, 154 F.3d at 1029-31.

[6] Under 49 U.S.C. 10901(a), a license from the Board (and an appropriate environmental review) is required for a railroad's construction of "an extension to any of its railroad lines . . . [or] . . . an additional railroad line . . . ." The terms "extension" and "additional railroad line" are not defined in the statute. These terms have been interpreted, however, in Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926) (Texas & Pacific), as those tracks that enable a railroad to penetrate or invade a new market. See Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

[7] In Stampede Pass, 2 S.T.B. at 339, the Board offered the following examples of state and local regulation that would not be preempted:

> a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad

(continued...)

The Board has stated that state and local regulation is appropriate where it does not interfere with interstate rail operations, and localities retain certain police powers to protect the public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted. Riverdale I at 8-9; Flynn. While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government "when it is undertaking an activity for which another entity would require a permit" and to furnish its site plan to the local government. Ridgefield Park. Local authorities can take actions that are necessary and appropriate to address a genuine emergency on railroad property.

Finally, the Board has concluded that "nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the [Clean Water Act], and the [Safe Drinking Water Act]." Ayer at 9.[8] Thus, the lack of a specific environmental remedy at the Board or at the local level as to construction projects over which the Board lacks licensing power does not mean that there are no environmental remedies under other Federal laws. Whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Id.[9]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[7](...continued)

> also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

[8] Section 10501(b) also does not preempt valid safety regulation under the Federal Rail Safety Act, 49 U.S.C. 20101 et seq. See Tyrrell v. Norfolk Southern Railway Company, No. 99-4505 (6th Cir. Apr. 25, 2001); Riverdale II at 2 n.4.

[9] The Board indicated, Ayer at 10, that

> individual situations need to reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

It is ordered:

1. Petitioner's request for a declaratory order proceeding is denied.

2. This decision is effective on July 29, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary